[2022 Gib LR 30]

STAGNETTO v. CASSAGLIA and GIBRALTAR HEALTH AUTHORITY

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): January 25th, 2022

2022/GCA/01

Employment—bullying at work—meaning of "bullying"—single incident of offensive or intimidating behaviour not bullying—Employment (Bullying at Work) Act 2014, s.4(2)(a) provides that offensive or intimidating behaviour must be persistent

Employment—Employment Tribunal—appeals—person whose actions Employment Tribunal found to constitute bullying entitled to appeal even though not party to tribunal proceedings

The appellant claimed to have been bullied at work.

In August 2019, the Employment Tribunal found the Gibraltar Health Authority liable for an act of bullying by the first respondent (the GHA's medical director) against the appellant, another employee of the GHA. The tribunal found that the first respondent had pushed the appellant and spoken to him in a raised voice using inappropriate language. The tribunal found that the act constituted an act of bullying within the meaning of s.4 of the Employment (Bullying at Work) Act 2014 for which the GHA was liable. The first respondent was not a party to the proceedings before the tribunal but he gave evidence about the incident. The appellant was awarded damages of £7,000 plus interest against the GHA.

The GHA initially lodged an appeal against the decision, which was later withdrawn. The first respondent applied for permission to bring judicial review proceedings in respect of the decision, naming the tribunal as the respondent and the GHA and the appellant as interested parties. The first respondent claimed that his conduct did not amount to bullying within the meaning of the Act and, even if it did, the GHA was not legally responsible for his conduct.

Yeats, J. held that, while he could allow the first appellant to pursue his judicial review claim, a more appropriate procedure was for the first respondent to exercise a statutory right of appeal to the Supreme Court. Yeats, J. rejected the submission that the first respondent should not be allowed to appeal because he was not a party to the proceedings below, he

had no direct interest in the outcome of the proceedings and no order was made specifically against him. The judge considered this to be an appropriate case for a non-party to be allowed to appeal on the basis that the first respondent had a significant interest in the proceedings given the effect of the ruling on his reputation and other adverse consequences, namely that he had felt obliged to stand down from his office and was subject to disciplinary proceedings for serious misconduct (2020 Gib LR 123). At the substantive hearing, also heard by Yeats, J., the appellant sought to reopen the procedural argument about standing and asserted, as he had done before the tribunal, that the first respondent should not be permitted to pursue the appeal as a non-party with no legal interests affected by the decision. Yeats, J. held that in so far as this procedural challenge was concerned, he was now *functus officio* as the order had been drawn up and sealed. Without prejudice to that conclusion, the judge considered the matter afresh and confirmed his original decision. In respect of the substantive issues, Yeats, J. found that the incident in question could not amount to bullying within the meaning of s.4 because it was a single incident. He also found that even if the incident did constitute bullying by the first respondent within the meaning of the Act, the GHA was not legally liable for it (2021 Gib LR 148). The appellant appealed against all of these rulings.

Section 4 of the Employment (Bullying at Work) Act 2014 provided in so far as material:

"**Meaning of bullying.**

(1) A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.

(2) In subsection (1) the reference to conduct includes—

(a) persistent behaviour which is offensive, intimidating, abusive, malicious or insulting;

(b) persistent unjustified criticism;

(c) punishment imposed without justification;

(d) changes in the duties or responsibilities of B to B's detriment without reasonable justification.

(3) Bullying does not include reasonable action taken by an employer relating to the management and direction of the employee or the employee's employment."

The appellant submitted *inter alia* that (a) the judge had not been *functus officio* in respect of the question of the first respondent's standing because the application had been by way of judicial review and there was no appeal against a grant of leave for judicial review so any challenge to standing could only be made at the substantive hearing; and furthermore, in a judicial review case it was in principle permissible for a court to review the question of standing again at the substantive hearing; (b) as the first respondent was not a party to the original decision, and as his legal rights were not affected by the order of the tribunal, the judge was wrong to find that he should be permitted to exercise a statutory right of appeal; (c) the first respondent complained about damage to his reputation, which was not a legitimate basis for allowing him to appeal; (d) s.4(1) provided the

relevant definition of bullying and the only issue was whether the conduct in question had the purpose or effect of causing B, the alleged victim, to be alarmed, distressed, humiliated or intimidated, and effect was an entirely subjective matter; (e) the tribunal was wrong to find that a single incident could only constitute bullying if it was sufficiently serious; (f) there was no basis from the statutory language to exclude a single incident, whether serious or otherwise, from constituting an act of bullying; (g) the GHA was vicariously liable for the first respondent's actions; (h) it would materially narrow the protection intended for bullied employees if an employer was only personally liable for his own wrongdoing and that could not be what Parliament intended; and (i) if an employer was not vicariously liable for the acts of his employees, he must be personally liable for their acts of bullying.

The first respondent submitted *inter alia* that (a) it was too late for the question of standing to be taken at the substantive hearing; (b) as to whether he had standing, in an evaluative exercise of this kind, this court should not interfere with the judge's decision unless the judge had erred in principle or reached a wrong decision; (c) the judge had given cogent and principled reasons for his conclusion that the first respondent had standing to appeal and the court should respect that ruling, in particular the reputational damage was not peripheral or incidental; and (d) in principle, single incidents were capable of constituting conduct falling within the scope of s.4(1), even if only rarely, however it was impossible to say that s.4(2) had no effect on the scope of s.4(1). When s.4(2)(a) and (b) provided that certain conduct must be persistent to amount to bullying, Parliament must have intended to exclude as examples of bullying any conduct of that nature which was not persistent.

The GHA submitted *inter alia* that s.4(2) was intended to be an exhaustive definition of conduct that could fall within the scope of s.4(1) such that if the conduct in question did not fall within the scope of s.4(2) it could not constitute bullying within the meaning of the Act.

Held, dismissing the appeal:

(1) Yeats, J. had correctly held that he was *functus officio* at the substantive hearing in respect of the first respondent's standing. The appellant's submission erroneously treated Yeats, J. as having granted permission for the first respondent to apply for judicial review. Although the first respondent had applied for judicial review, the judge instead deemed the first respondent to have pursued the alternative remedy of appealing the tribunal decision to the Supreme Court. That order could only have been made on the basis that the first respondent had sufficient interest to lodge the appeal notwithstanding that he had not been a party before the tribunal, otherwise it would not have been appropriate to dismiss (as against the tribunal) the judicial review proceedings because of the existence of an alternative and more appropriate appellate procedure. That ruling could have been appealed but was not. Once the order giving effect to the judgment was made, the judge was *functus officio* and was not

empowered to revisit his own decision. The suggestion that Yeats, J. had recognized that he had not heard full argument on the issue of standing to appeal, with the implication that he did not intend his decision to be final, was also incorrect. In any event, once the judge made an order establishing the first respondent's entitlement to appeal, it would be binding unless and until set aside by a superior court, irrespective of whether it had been made following full argument. It was therefore too late for the question of standing to have been taken at the substantive hearing, Yeats, J. was correct so to hold and the appeal on this point would be dismissed (paras. 12–15).

(2) Although the judge was *functus officio* and could not revisit the question of standing, in any event he was justified in the circumstances in concluding that the first respondent should be allowed to appeal the tribunal's decision even though he had not been a party before the tribunal. Rule 3(1) of the Employment (Appeals) Tribunal Rules 2005 provided that "any person . . . wishing to appeal to the court against a decision of the Tribunal shall . . . file . . . a notice of appeal . . ." It was material to note that the rule did not say "any party" and therefore might be said to envisage that persons who were not parties before the tribunal could nevertheless appeal in an appropriate case. In an evaluative exercise of this kind, the court should not interfere with the judge's decision unless the judge had erred in principle or reached a decision which was wrong. The court found that the judge had not erred in law and that he had reached a conclusion which was plainly open to him. In general, courts must be astute to prevent non-parties from seeking to open up appeals where they had no direct interest in the outcome of the case. There must be finality in the litigation process and it should be unusual for someone other than the parties to the legal dispute to be permitted to appeal. However, there would be cases where justice required that third parties should be allowed to challenge the decision reached below, sometimes even where they had chosen not to be represented in the original proceedings. Even though the first respondent was not challenging the primary findings of fact made by the tribunal, he had been characterized as a bully, with the reprehensible overtones which that word connoted. Like the judge, the court considered that the first respondent had a powerful and legitimate interest in seeking to establish that his conduct was not fairly described in that way. He was seeking to show that that was wrong as a matter of law and to that extent he had an interest in the terms of the order itself. There were certain unusual features of this case, namely (i) the first respondent did not seek to challenge the findings of fact themselves; and (ii) he would not have sought to be involved in the appeal had the GHA not withdrawn its appeal. The judge also considered that the impact of the judgment on the first respondent, in particular that he had to step down from his role as medical director, justified allowing him to appeal. The court had reservations as to this basis for justifying a non-party being allowed to appeal and did not consider it could be relied upon (paras. 17–19; paras. 36–43).

(3) Yeats, J. correctly concluded that the incident in question did not and could not in law amount to bullying. Yeats, J. correctly concluded that if alleged conduct fell within the scope of s.4(2)(a) or (b) of the Employment (Bullying at Work) Act, it must be persistent in order to constitute bullying. It would make no sense for Parliament to have identified in those examples the need for repetitive conduct if single incidents of that nature would suffice. There was no basis for concluding, as did the tribunal, that a distinction could be drawn between serious and less serious conduct. It followed that the relevant incident, being a one-off matter, could not amount to bullying as defined. The court would uphold Yeats, J.'s conclusion on this point for the reasons he gave. Moreover, this was a sensible conclusion. It was a serious matter to characterize someone as a bully and should not be lightly done. It was not necessary to determine whether the GHA was correct to say that s.4(2) was exhaustive of the matters which might constitute bullying, and that bullying must always involve persistent behaviour. However, the submissions raised points of potential importance and the court made some observations on them. There was some merit in the argument that s.4(2) was intended to be exhaustive and that, even if not exhaustive, it would be rare for bullying conduct not to be caught by one of the provisions in s.4(2). Section 4(2)(a), which referred to "offensive, intimidating, abusive, malicious or insulting" behaviour, captured the essence of bullying conduct and was cast in very broad terms. It required the behaviour there described to be persistent. Section 4(2)(b)–(d) could be seen as specific examples of the more serious acts directed at employees. The court would leave open the question whether single incidents other than those described in s.4(2)(c) and (d) could ever constitute bullying but, if they could, it would only be in a very unusual case (paras. 73–80).

(4) Although this issue did not strictly arise given the court's conclusion that there had been no bullying in law, the court considered whether, on the assumption that the first respondent's conduct amounted to bullying in law, the GHA would have been liable for his actions. An employer could either be vicariously liable for the wrongdoing of his employee or personally liable for his own wrongdoing. The GHA could not have been vicariously liable for the act of bullying by an employee in the circumstances of this case. Vicarious liability was a secondary not a primary liability; it could only arise when an employee had primary liability for the alleged wrong. Since the employee was not personally liable in law for the act of bullying, the doctrine of vicarious liability did not arise. Consequently, any liability of the employer had to be personal liability. Statute could, and sometimes did, specifically impose a personal liability on the employer for the acts of its employees by deeming or treating the acts of the employee as the act of the employer. The Equal Opportunities Act 2006 prohibited discrimination and victimization with respect to a wide variety of grounds. Section 47(1) provided that "Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval." There was no similar express provision in the Employment

(Bullying at Work) Act so that if the acts of employees were to be attributed to the employer, this principle would have to be implied. That was a difficult argument where Parliament had chosen not to so provide. The court did not accept that the Employment (Bullying at Work) Act would be rendered virtually useless without making the employer liable in that way. There were powerful arguments against implying a statutory personal liability for the acts of all employees but the court was unwilling to reach a conclusion on this issue. On the facts of the present case, it might well be that the application of the principles in *Meridian Global Funds Mgmt. Asia Ltd.* v. *Securities Commn*. ([1995] 2 A.C. 500) (that an employer, if a corporate body, could in an appropriate case be liable in law for conduct of an employee whose acts or state of mind could properly be attributed to the employer) would have made the GHA personally liable for the acts of its medical director. On that basis, if the single incident could have constituted an act of bullying, compensation would have been payable. However, the case was not argued on that basis. Liability was said to attach to the employer simply on the basis that he was liable for the act of his employees, either vicariously or personally, irrespective of their function or status (paras. 81–93).

Cases cited:

(1) *Dilworth* v. *Stamps Commr*., [1899] A.C. 99, referred to.
(2) *George Wimpey UK Ltd.* v. *Tewkesbury Borough Council*, [2008] EWCA Civ 12; [2008] 1 W.L.R. 1649; [2008] 3 All E.R. 859; [2008] NPC 6; [2008] C.P. Rep. 19, considered.
(3) *Gray* v. *Boreh*, [2017] EWCA Civ 56, considered.
(4) *Inland Rev. Commrs.* v. *National Fedn. of Self-Employed & Small Businesses Ltd.*, [1982] A.C. 617; [1981] 2 All E.R. 93, referred to.
(5) *Majrowski* v. *Guy's & St. Thomas's NHS Trust*, [2006] UKHL 34; [2007] 1 A.C. 224; [2006] 3 W.L.R. 125; [2006] 4 All E.R. 395; (2006), 91 BMLR 85; [2006] ICR 1199; [2006] IRLR 695, considered.
(6) *Meridian Global Funds Mgmt. Asia Ltd.* v. *Securities Commn.*, [1995] 2 A.C. 500; [1995] 3 W.L.R. 413; [1995] 3 All E.R. 918; [1995] 2 BCLC 116; [1995] BCC 942, considered.
(7) *Multiplex Constr. (UK) Ltd.* v. *Honeywell Control Systems Ltd.*, [2007] EWHC 236 (TCC), referred to.
(8) *NHS Manchester* v. *Fecitt*, [2011] EWCA Civ 1190; [2012] IRLR 64; [2012] ICR 372, considered.
(9) *R.* v. *Monopolies & Mergers Commn.*, *ex p. Argyll Group*, [1987] Q.B. 815; [1986] 1 W.L.R. 763; [1986] 2 All E.R. 257, referred to.
(10) *W (A Child)*, *Re*, [2016] EWCA Civ 1140; [2017] 1 W.L.R. 2415; [2017] 1 FLR 1629; [2017] 1 F.C.R. 349, considered.

Legislation construed:
Employment Tribunal (Appeals) Rules, 2005, r.3.1: The relevant terms of this provision are set out at para. 18.

Employment (Bullying at Work) Act 2014, s.4: The relevant terms of this section are set out at para. 50.
s.6: The relevant terms of this section are set out at para. 50.
s.9(2): The relevant terms of this subsection are set out at para. 52.

Equal Opportunities Act 2006, s.47(1): The relevant terms of this subsection are set out at para. 86.
s.47(3): The relevant terms of this subsection are set out at para. 87.

R. Clayton, *Q.C.* assisted by *A. Cardona* (instructed by Phillips) for the appellant;
G. Licudi, *Q.C.* assisted by *D. Martinez* (instructed by Hassans) for the first respondent;
N. Cruz assisted by *G. Tin* (instructed by Cruzlaw LLP) for the second respondent.

1 **ELIAS, J.A.:**

Introduction

This case raises points of some significance about the scope and effect of the Employment (Bullying at Work) Act 2014. The appellant, Mr. Stagnetto, a senior biochemist employed by the Gibraltar Health Authority ("the GHA"), alleged that he had been subjected to an act of bullying by Dr. Cassaglia, the Medical Director of the GHA, and that the GHA was legally liable for Dr. Cassaglia's conduct. Put very briefly, the alleged bullying involved Dr. Cassaglia pushing Mr. Stagnetto and shouting and swearing at him. An employment tribunal ("the tribunal") held that the alleged act had taken place and that it did constitute an act of bullying within the meaning of s.4 of the Employment (Bullying at Work) Act 2014 for which the Authority was liable. Dr. Cassaglia was not a party to the proceedings before the tribunal but he had given evidence about the incident but his account was not believed. Subsequently there was a remedies hearing and Mr. Stagnetto was awarded £7,000 damages plus interest against the GHA.

2 The GHA did initially lodge an appeal against the decision but later withdrew it. It was only then that Dr. Cassaglia, who was unhappy with the tribunal decision, made an application for permission to judicially review the decision, naming the tribunal as respondent and the GHA and Mr. Stagnetto as interested parties. Dr. Cassaglia sought to have the decision quashed. He was not, however, specifically challenging the tribunal's factual finding that he had committed the conduct of which Mr. Stagnetto complained. His principal legal ground was that his conduct did not amount to bullying within the meaning of the Act but he also alleged that even if it

did, the Authority was not legally responsible for his conduct. A further quite distinct ground in the application was that he did not have a fair hearing before the tribunal. In the event, this ground was ultimately unsuccessful and since it has not been appealed, I need not discuss it further.

3 The permission application was heard by Yeats, J. Sir Peter Caruana, Q.C., counsel for the tribunal, argued that the judicial review application should be dismissed because Dr. Cassaglia had not exhausted his right of appeal. The tribunal was not, however, seeking in principle to prevent the decision being challenged by an aggrieved party and Sir Peter suggested that the court should reconstitute itself as an appellate court. Yeats, J. adopted that course of action. In a judgment given on April 2nd, 2020 (reported at 2020 Gib LR 123) he held that whilst he could quite properly allow Dr. Cassaglia to pursue his judicial review claim, a more appropriate procedure was for Dr. Cassaglia to exercise a statutory right of appeal to the Supreme Court. In reaching that conclusion the judge first had to consider whether Dr. Cassaglia was entitled to appeal at all.

4 It was argued by the GHA and Mr. Stagnetto that he should not be allowed to appeal given that he was not a party to the proceedings below, that he had not even applied to be a party, and that he had no direct interest in the outcome of the proceedings: no order was made specifically against him, and nor was he personally liable in damages. (In fact initially Dr. Cassaglia was also arguing that he had no right of appeal but that was to enable him to keep his judicial review application on foot.) The judge rejected these submissions. He noted that the right to appeal was not limited to parties to the decision appealed against, and concluded that the rules permitted a non-party to appeal in an appropriate case. In the judge's view this was such a case. Dr. Cassaglia had a significant interest in the proceedings given the effect of the ruling on his reputation and other adverse consequences, namely the fact that Dr. Cassaglia had felt obliged to stand down from his office and was subject to disciplinary proceedings for serious misconduct. The judge relied upon English Court of Appeal authorities, which I discuss below, allowing non-parties to pursue an appeal in appropriate circumstances. The judge also extended time for appealing, not least because it was reasonable for Dr. Cassaglia not to make his own application to the court whilst the GHA's appeal was still pending. There has been no appeal against that particular ruling.

5 It is important to note the terms of the order which the judge approved on June 26th, 2020 following the April hearing. So far as is material to this appeal, they were as follows:

> "1. The judicial review claim against the First Defendant [the tribunal] is dismissed with no order as to costs.
>
> 2. The judicial review proceedings against the First and Second Interested Parties [the GHA and Mr. Stagnetto] are hereby reconstituted

> as appeal proceedings and are deemed to have been brought by the claimant as Appellant, pursuant to rule 3 of the Employment Tribunal Rules 2005 . . .
>
> 4. The Gibraltar Health Authority and Lawrence Stagnetto should be the Respondents to the appeal proceedings."

6 At the substantive hearing, also heard by Yeats, J., Mr. Stagnetto sought to re-open the procedural argument about standing and asserted, as he had done before the tribunal, that Dr. Cassaglia should not be permitted to pursue the appeal as a non-party with no legal interests affected by the decision. The judge held that in so far as this procedural challenge was concerned, he was now *functus officio*. He had made a ruling in April that Dr. Cassaglia was an appropriate appellant and could not revisit that issue. Without prejudice to that conclusion, however, he did in fact consider the argument afresh and confirmed his original decision. The effect was that even if he were wrong about being *functus officio* so that he was entitled to reconsider the question of standing, his view remained the same: Dr. Cassaglia should be permitted to pursue the appeal.

7 So far as the substantive issues were concerned, Yeats, J. upheld an argument advanced by both Dr. Cassaglia and the GHA that the incident in question could not amount to bullying within the meaning of s.4 because it was only a single incident. He also agreed with a separate argument, advanced by Dr. Cassaglia, that even if the incident did constitute bullying by Dr. Cassaglia within the meaning of the statute, the GHA was not legally liable for such bullying.

8 Mr. Stagnetto has appealed all these rulings. There are, therefore, two procedural issues before the court—*functus officio* and standing to appeal—and two substantive issues—was there bullying and, if so, was the employer liable for it? I will consider the two sets of issues separately. For the purposes of dealing with the procedural issues, it is not necessary to discuss the facts in more detail. I will consider them more fully when analysing the substantive issues.

Procedural issue (1): *functus officio*

9 The judge's reasoning on this point can be succinctly stated: he had heard and rejected a submission at the permission hearing that Dr. Cassaglia did not have a sufficient interest in the outcome of the proceedings to be treated as a person with a right to appeal the tribunal decision. That was an appealable decision but counsel for Mr. Stagnetto expressly stated that he would not appeal it, and he did not do so. Thereafter, once the order reflecting the terms of the judgment had been drawn up and sealed, the judge was *functus officio* and had no power to revisit the issue. As Jackson, J. had observed in *Multiplex Constr. (UK) Ltd.* v. *Honeywell Control Systems Ltd.* (7) ([2007] EWHC 236 (TCC), at para. 24): "It is clear that

when the court gives judgment on a matter, the court's jurisdiction does not lapse in respect of that matter until the order giving effect to that judgment has been drawn up and sealed." Any challenge to the decision had to be pursued by way of an appeal and dealt with by the appellate court.

10 Mr. Clayton, Q.C., counsel for the appellant, asserted that this was an erroneous approach. The application had been by way of judicial review and there is no appeal against the grant of leave for judicial review: see *R.* v. *Monopolies & Mergers Commn.*, *ex p. Argyll Group* (9) ([1986] 1 W.L.R. at 774A, *per* Sir John Donaldson, M.R.). Any challenge to standing could therefore only be made at the substantive hearing.

11 Furthermore, in a judicial review case it is in principle permissible for a court to review the question of standing again at the substantive hearing. The issue of standing in such cases depends on the claimant showing a "sufficient interest in the matter to which the application relates," and often that cannot be finally determined until a court has a proper understanding of the legal and factual context: see *Inland Rev. Commrs.* v. *National Fedn. of Self-Employed & Small Businesses Ltd.* (4) ([1982] A.C. at 630, *per* Lord Wilberforce). This is particularly so given that the judge himself had recognized (so it was said) that the point had not been fully argued before him at the leave hearing: see para. 26 of his judgment on appeal.

12 In my judgment there are a number of problems with this submission. The fundamental one is that they treat Yeats, J. as having granted permission for Dr. Cassaglia to apply for judicial review. That is not what he did. Although the original application was to obtain such permission, it is plain, both from the judgment and the order made pursuant to it, that the judge did not grant permission for judicial review. The application against the tribunal itself was dismissed and proceedings were stayed as against Mr. Stagnetto and the GHA, who became parties to the statutory appeal. Instead, the judge deemed Dr. Cassaglia to have pursued the alternative remedy of appealing the tribunal decision to the Supreme Court. That order could only have been made on the basis that Dr. Cassaglia was someone who had sufficient interest to lodge the appeal notwithstanding that he had not been a party before the tribunal, otherwise it would not have been appropriate to dismiss (as against the tribunal) the judicial review proceedings because of the existence of an alternative and more appropriate appellate procedure. It could hardly be an appropriate alternative procedure if the appellant could not use it. That was a ruling which could have been appealed but was not. Once the order giving effect to the judgment was made, the judge was *functus officio* and was not empowered to revisit his own decision, as the *dictum* of Jackson, J. makes clear.

13 The reliance on the *IRC* case is also misconceived for two reasons. First, the law relating to leave for judicial review is irrelevant given that no permission was granted. Second, Lord Wilberforce was saying that it was

in principle inappropriate for a court to grant permission at the leave stage save in a very clear case but he was not suggesting that the issue of permission could be reconsidered once the court had actually granted it.

14 Finally, the suggestion that the judge himself had recognized that he had not heard full argument on the issue of standing to appeal, with the implication that he was not intending his decision to be final, is also incorrect. What the judge actually said (para. 26) was that he had not heard full argument on the different question whether Dr. Cassaglia could under the relevant rules have been joined as a party before the tribunal below and so he did not reach a definitive conclusion about that. He was not there addressing his ruling that Dr. Cassaglia had standing to appeal the tribunal's decision. In any event, once the judge had made an order establishing Dr. Cassaglia's entitlement to appeal, it would be binding unless and until set aside by a superior court, irrespective of whether his decision had been made following full argument or not.

15 It was, therefore, too late for the question of standing to be taken at the substantive hearing. As Mr. Licudi, Q.C., counsel for Dr. Cassaglia, succinctly put it, "that ship had sailed," at least as far as the Supreme Court was concerned. The judge was entirely right so to hold and I would dismiss the appeal on this point.

16 In the light of that conclusion, the related procedural ground does not strictly arise. However, the judge dealt with it and we were asked by all counsel to address it, and I will do so.

Procedural issue (2): standing

17 The judge in the appeal itself revisited the question of standing and confirmed that in his view Dr. Cassaglia was entitled to appeal the decision of the tribunal despite not having been a party before that body. The arguments advanced before us largely echo those made before Yeats, J. The main submission is that since Dr. Cassaglia was not a party to the original decision, and given that his legal rights were not affected in any way by the order of the tribunal, the judge was wrong to find that he should be permitted to exercise a statutory right of appeal.

18 Rule 3(1) of the Employment (Appeals) Tribunal Rules 2005 provides that:

> "Any person (the 'appellant') wishing to appeal to the court against a decision of the Tribunal shall, within 21 days of the decision, file with the Registrar a notice of appeal in substantially the form set out in Schedule 1 . . ."

19 It is material to note that the rule does not say "any party" and therefore might be said to envisage that persons who were not parties in the tribunal could nevertheless appeal in an appropriate case.

20 We were referred to a number of authorities (also considered by the judge) where, in the context of similarly worded rules, the Court of Appeal in England and Wales has considered whether, and in what circumstances, it would be appropriate to afford a right of appeal to non-parties. Plainly it could not be anyone who felt aggrieved at the decision, irrespective of his or her connection with the case.

21 In *George Wimpey UK Ltd.* v. *Tewkesbury Borough Council* (2), the Court of Appeal was concerned with the application of CPR r.52.1(3)(d) which provided that an appellant meant "a person who brings or seeks to bring an appeal." Like the Gibraltar rule, therefore, the right is not expressly limited to a party to the proceedings appealed against. But was it implicitly so limited?

22 The facts in that case were that Wimpey successfully challenged in the High Court parts of a local development plan which had been adopted by the council. The parts under challenge had allocated residential development of certain sites, and those parts were quashed as a result of the judge's decision. The council chose not to appeal the decision but the owners of the land affected, MA, sought to do so. They had not participated in the proceedings below and the point taken against them was that the court had no jurisdiction to allow a non-party to appeal. Alternatively, it was argued that this jurisdiction should only be exercised in exceptional circumstances and that these could not be so characterized.

23 Dyson, L.J., with whose judgment Lloyd, L.J. agreed, held that MA should be permitted to appeal. Dyson, L.J. observed that had the intention been to bar non-parties from appealing, one would have expected the draftsman to have said so ([2008] EWCA Civ 12, at para. 17):

> "I do not accept Mr Village's submissions as to the meaning of 'appellant'. I see no reason not to give the definition its plain and ordinary meaning. The word 'person' in rule 52.1(3)(d) is not qualified by the words 'who was a party to the proceedings in the lower court'. If it had been intended to restrict an 'appellant' to a person who was a party in the lower court, one would have expected the draftsman so to provide expressly . . ."

24 Furthermore, such an automatic bar could work injustice (*ibid.*, at para. 9):

> "9. It would be surprising if the effect of the CPR were that a person affected by a decision could not in any circumstances seek permission to appeal unless he was a party to the proceedings below. Such a rule could work a real injustice, particularly in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal and an appeal would have real prospects of success."

25 In principle, therefore, a non-party may appeal even though—indeed, often because—none of the parties has chosen to do so, particularly where the denial of the right to appeal would work a real injustice. Dyson, L.J. indicated (*ibid.*, at para. 25) that it might be unnecessary, and even inappropriate, to seek to be joined as a party in the appeal if one of the original parties was intending to run essentially the same arguments as the non-party wished to pursue; duplicity of representation is not in principle desirable and the courts will not readily permit joinder where this is the consequence.

26 Unnecessary duplicity of representation might also explain why a non-party might choose not to seek to be joined at the trial stage. In *Wimpey* it was contended, as a reason for not allowing MA to appeal, that they chose not to appear below. Dyson, L.J. held that this should not be held against them; their position did not differ from that of the council and in those circumstances any application to be joined as a party may well have failed in any event. But that did not mean that the application to appeal should be refused where the council had opted not to appeal. As Dyson, L.J. put it (*ibid.*, at para. 29):

> "The true analogue would be an application by MA to be added as a party to the appeal if the Council *had* been appealing. The fact that the Council had decided not to appeal completely changed the landscape."

27 Dyson, L.J. considered that there were real prospects of success and MA had a sufficient interest in the outcome of the appeal. Accordingly, permission to appeal was granted.

28 *Wimpey* was followed by the Court of Appeal in *Re W (A Child)* (10). A local authority brought care proceedings on the basis that family members had abused the children concerned. The judge rejected the allegations and was highly critical of the conduct of the local authority and also of a policeman and social worker identified in the judgment. The two individuals wished to appeal the findings against them, albeit that they were not parties to the original proceedings. The court held that in fact they probably had the status of interveners in the action, but that in any event they could, in an appropriate case, appeal as non-parties following *Wimpey*. They were alleging that the judge below had criticized them without affording them the procedural safeguards envisaged by arts. 6 and/or 8 of the European Convention on Human Rights. They were held to have a sufficient interest to advance their appeals and in the event they succeeded.

29 *Wimpey* was also considered in *Gray* v. *Boreh* (3). Mr. Gray was a senior solicitor who was found by a High Court judge to have behaved dishonestly and to have deliberately misled the court when successfully seeking a freezing injunction on behalf of his client, the state of Djibouti. In the proceedings to set the order aside, he had been called to give

evidence as an officer of the court and was legally represented. He was not a party to the action but nevertheless sought to appeal against the findings made against him, asserting that they had been determined in a procedurally unfair manner (grounds 1–3 referred to in the judgment as the "procedural grounds"). He also sought to challenge other findings of the judge not directly related to him (grounds 4–12, referred to as the "substantive grounds"). As a consequence of the court's criticisms, he had been dismissed as a partner of his firm and faced professional disciplinary proceedings.

30 Gloster, L.J. gave a judgment with which Briggs, L.J. agreed. She set out the issue of law before the court in the following terms ([2017] EWCA Civ 56, at para. 18):

> "The issue of law on this application is therefore whether this court has jurisdiction to hear an appeal by a non-party to proceedings in respect of a finding of dishonesty made against him in those proceedings, in circumstances where the non-party is not seeking to have any operative terms of the order set aside."

31 Gloster, L.J. held that so far as the substantive grounds were concerned, the court had no jurisdiction to hear them. This was not simply because Mr. Gray was a non-party below (save that he had been added as a party by the judge specifically to permit him to seek to appeal) but because he had no interest of any kind in the outcome. The judge gave a number of reasons for her conclusion; the following are in particular relevant to this appeal (*ibid.*, at para. 35(i) and (ii)):

> "i) Contrary to the position of the appellant in [*Wimpey*] Mr Gray was not a person who was substantively affected by Flaux J's decision to set aside the freezing order or who had any substantive interest in it being set aside, such as to confer on him a right of appeal. Mr Gray had no personal, in the sense of financial or proprietary, interest in the freezing order remaining in place, or being set aside. He had no legal or equitable rights which were affected in any way by the decision. His only interest in the outcome of the set aside application was reputational . . .
>
> ii) . . . normally, this court does not have jurisdiction to entertain an appeal against findings of fact which do not amount to a determination, order or judgment, *unless they concern the issue upon which the determination of the whole case ultimately turns or are otherwise subject of a declaration within the order*." [Emphasis added.]

32 As to the procedural issue, Gloster, L.J. was prepared to accept, as counsel had conceded, that the court had jurisdiction to hear that complaint but she was not prepared to exercise her discretion in Mr. Gray's favour. First, he had no real prospect of success but, in any event, any decision in

Mr. Gray's favour could upset the judge's factual analysis and call into question the findings in the substantive decision, perhaps leading to further hearings. That would undermine the rights of the litigants who could expect finality in the litigation, a decision reached within a reasonable time, and the right not to be subjected to what might effectively be appeals at the behest of a non-party (see especially, *ibid.*, at paras. 33 and 47). Furthermore, the disciplinary body was not bound by the judge's factual findings and so the outcome of those proceedings was not resolved by the judge's findings.

33 Mr. Clayton essentially repeated the arguments advanced on behalf of Mr. Stagnetto below. He submitted that in substance Dr. Cassaglia was in the same position as Mr. Gray; he was complaining about damage to his reputation. That was not a legitimate basis for allowing him to appeal. He had no other interest in the proceedings. Like *Gray*, but unlike *Wimpey* (2), he had no legal interest affected by the court order. Further, he had not even sought to be joined as a party below, and this should also be a factor militating against him.

34 The judge had rejected these arguments. He analysed the *Boreh* case (3) in particular with some care but held that the principles there enunciated were not applicable to this case. His conclusion was set out in the following paragraphs (2021 Gib LR 148, at para. 41):

> "41 I do not consider that Mr. Cardona's comment that I am 'breaking new ground' in proceeding with this appeal would be correct. This is not a question of allowing a professional witness to appeal because he disagrees with a judge's criticism of his evidence, professionalism or conduct. This is an appeal by the person who is said to have done the act on which the declaration made by the Chairman in the award was based."

35 He then noted that this was the very circumstance where Gloster, L.J. in *Gray* (3) ([2017] EWCA Civ 56, at para. 35(ii)) had envisaged that the right to appeal might properly be given to a non-party (see the italicized comments in the quote at para. 31 above). He continued (2021 Gib LR 148, at para. 42):

> "42 The circumstances of both *Gray* v. *Boreh* and *Re W (A Child)* . . . were very different from this case. There, neither of the appellants/prospective appellants were truly interested in the orders made by the courts. It was only the findings made about them personally that they were complaining about. In this case, Dr. Cassaglia is complaining about the finding that he bullied Mr. Stagnetto. This was the central and only issue in the case. That was the issue upon which the determination of the whole case ultimately turned. The declaration made in the award is based on those findings. Mr. Licudi suggested that if the tribunal had found that Dr. Cassaglia had pushed and shouted at Mr. Stagnetto but then dismissed the claim on the basis that

> a one-off incident is not bullying under the Act, then that could be said to be analogous to *Gray* v. *Boreh*. Dr. Cassaglia would then have been concerned about the finding but not with the order. I agree."

36 Mr. Licudi, Q.C., in a powerful submission on behalf of Dr. Cassaglia, submitted that in an evaluative exercise of this kind, this court should not interfere with the judge's decision unless the judge had erred in principle or reached a decision which was wrong. In my judgment that must be correct. Mr. Licudi asserted that the judge had given cogent and principled reasons for his conclusion and the court should respect that ruling. In particular, the reputational damage was not peripheral or incidental to the issues in the case; on the contrary, it resulted from an incident which lay at its very heart.

37 I agree with that submission. In my view the judge did not err in law and reached a conclusion which was plainly open to him. I accept that in general courts must be astute to prevent non-parties from seeking to open up appeals where they have no direct interest in the outcome of the case. There must be finality in the litigation process, and it should be unusual for someone other than the parties to the legal dispute to be permitted to bring an appeal. But as Lord Dyson's observations in *Wimpey* (2) make clear, there will be cases where justice requires that third parties should be allowed to challenge the decision reached below, sometimes even where they have chosen not to be represented in the original proceedings. Even though Dr. Cassaglia is not challenging the primary findings of fact made by the tribunal, he has been characterized as a bully, with the reprehensible overtones which that word connotes. Like the judge, I think he has a powerful and legitimate interest in seeking to establish that his conduct is not fairly described in that way. He is seeking to show that this is wrong as a matter of law and to that extent he has an interest in the terms of the order itself.

38 There are certain unusual features of this case which, although not specifically mentioned by the judge when he considered this question, would have been obvious to him and they further support his conclusion. First, Dr. Cassaglia is not seeking to challenge the findings of fact themselves. This case is to that extent quite different from the *Gray* case (3); there is no question of the decision below being tainted by potentially conflicting factual findings. Second, he would not have sought to be involved in the appeal had the GHA not withdrawn its appeal. It was only after the GHA had taken that step that he sought to challenge the decision. (In fact the GHA subsequently joined the proceedings once Dr. Cassaglia's appeal was on foot.)

39 In the course of this hearing Dr. Cassaglia has made submissions not only on the question whether his conduct amounted to bullying, but also on the related but distinct question whether the GHA was, as a matter of law,

responsible for his actions. If that were the only point he was seeking to advance in his appeal, I would not have been prepared to say that he had any sufficient interest in that issue to justify being allowed to appeal. That is essentially a matter between the GHA and the appellant and Dr. Cassaglia has no special personal interest in the answer to that question. That does not mean that he was disentitled from making submissions on that point, however. Once he has been properly joined as a party to the appeal, he is in the same position as any other party and is entitled to raise and make submissions on all issues arising out of the first instance decision.

40 I therefore conclude that the judge was fully entitled to reach the decision he did, essentially for the reasons he set out in paras. 41–42 of the decision.

41 The judge did in fact go further and held that the impact of the judgment on Dr. Cassaglia justified allowing him to appeal. He said this (2021 Gib LR 148, at para. 43):

> "43 Furthermore, I consider that Dr. Cassaglia has been directly affected by the judgment and/or the award (as will be discussed later in this judgment). In particular, he had to step aside from his role as Medical Director. Counsel also referred me to *Ageas Ins. Ltd.* v. *Stoodley Advantage Ins. Co. Ltd.* . . . It is an English County Court case referred to in the commentary to CPR 40.9 in the White Book. (CPR 40.9 provides that a person who is not a party, but who is directly affected by a judgment or order, may apply to set it aside.) Judge Cotter, Q.C. said ([2019] Lloyd's Rep. I.R. 1, at para. 40):
>
> > 'In my judgment the requirement to be "directly affected", which should be considered flexibly in light of the overarching need to ensure that injustice is not done to those affected by judgment or order, has two elements; firstly that the non-party be materially and adversely affected by the judgment or order and secondly that the effect is direct and not indirect.'"

42 I have reservations about this basis for justifying a non-party being allowed to appeal, and I do not think it can be relied upon. This paragraph would appear to suggest that the consequences of damage to reputation, such as loss of a job, can on their own be sufficient to allow a non-party to appeal as someone directly affected by the judgment. That does not sit happily with the *Gray* case (3) where the appellant both was dismissed from the legal partnership and faced professional disciplinary action. I doubt whether such consequences flowing from the damage to reputation can be said to result directly from the judgment or order; nor do I think it can readily be assumed that the flexibility which Judge Cotter gave to the concept of "directly affected" in the specific context of setting a judgment aside can necessarily be adopted to the different issue of when a non-party can appeal. Judge Cotter was not referred to any of the three authorities

discussed above relating to the right of appeal, and in my view he cannot be taken to have approved a conclusion that damage to reputation, and any adverse consequences flowing from it, would of itself entitle a non-party to exercise a right of appeal.

43 It follows that in my judgment the judge was right to reject the two procedural points, in large part for the reasons he gave. He was *functus officio* and could not revisit the question of standing; and in any event, he was justified in the particular circumstances in concluding that Dr. Cassaglia should be allowed to appeal the decision, notwithstanding that he was a non-party to the original litigation.

The substantive issues in the appeal

44 I turn to consider the two substantive issues: did Dr. Cassaglia's conduct amount to bullying as defined; and, if it was, was the GHA legally liable for that conduct?

The finding of the tribunal on the relevant incident

45 The tribunal made relevant findings of fact which have not been challenged. Evidence was heard over seven days. Mr. Stagnetto and Dr. Cassaglia gave evidence, as did three other members of staff who had been present when the incident occurred.

46 The tribunal carried out an extremely thorough and reasoned evaluation of the evidence. The circumstances leading up to the incident were as follows. In August 2020, Dr. Cassaglia received a letter of complaint from the Ombudsman about the treatment of a child patient. In order to respond adequately, Dr. Cassaglia required information from the laboratory regarding the patient's blood test results and the audit logs showing who had previously accessed the results. Dr. Cassaglia personally visited the laboratory to request the information he needed. He was able to see the information on a staff member's computer screen and he asked for it to be emailed to him. The information was not in fact sent and when Dr. Cassaglia queried this over the telephone, he was told that the provision of the information had to be authorized in accordance with the laboratory protocol. He admitted that he was frustrated and upset by this response and he immediately returned to the laboratory. That is when the incident complained of took place. Mr. Stagnetto was standing by the door to the histology section with three colleagues. Dr. Cassaglia purposively strode down the corridor and directed himself at Mr. Stagnetto. There was a conflict of evidence about precisely what happened thereafter but the tribunal's conclusion was in essence that Dr. Cassaglia pushed Mr. Stagnetto into the room, shouted and swore at him, and accused him of blocking the release of the information he had sought. The Chairman

summarized the key features of the incident as follows (set out at 2021 Gib LR 148, para. 21):

> "Dealing first with the issue of whether there was conduct that amounted to bullying. I have, as stated above, concluded that Dr Cassaglia (i) pushed Mr Stagnetto on both shoulders (ii) spoke to Mr Stagnetto in a raised and raising voice whilst gesticulating with his hands (iii) wrongfully accused Mr Stagnetto using inappropriate language on more than one occasion of preventing the release of the Modulab information and (iv) was angry and frustrated at the time. This all occurred in one continuing incident spanning a few minutes in time."

47 The tribunal accepted the evidence of Mr. Stagnetto that he had felt distressed and intimidated by Dr. Cassaaglia's behaviour. It concluded that in all the circumstances although this was a single continuing incident of misconduct, it was of a serious nature and amounted to bullying within the meaning of the Act. Whether that is a legally sound conclusion is the central issue in this appeal, as it was before Yeats, J.

48 Mrs. Olivares Smith, who was the Quality Manager for the laboratory, was also a party before the tribunal, having made her own application alleging bullying by Dr. Cassaglia. She had intervened when Dr. Cassaglia was shouting at Mr. Stagnetto, and told Dr. Cassaglia that it was she who had blocked the request for information. She said that Dr. Cassaglia had pointed a finger at her and towered over her, saying that no-one should interfere with the investigation he was carrying out. Her application was unsuccessful, however.

49 There have been other serious consequences arising out of the incident, quite apart from this litigation. Dr. Cassaglia felt obliged to stand down from his post and he has been subject to disciplinary proceedings for alleged serious misconduct.

The law

50 I turn to consider the relevant law. The Act in question is the Employment (Bullying at Work) Act 2014 which is relatively short. Section 3 provides that the Act applies to bullying and victimization in employment and that it binds the Crown. Section 4 defines bullying and s.5 defines victimization. Sections 6 and 7 contain the prohibitions against bullying and victimization respectively, *i.e.* they set out when bullying and victimization give rise to liability under the Act. Section 8 deals with the jurisdiction of the tribunal and s.9 with remedies. The Schedule to the Act sets out the requirements of a Bullying at Work Policy for employers. In this appeal we are mainly concerned with s.4 and s.6 of the Act and I shall set both of these provisions out in full:

"**Meaning of bullying.**

4.(1) A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.

(2) In subsection (1) the reference to conduct includes—

(a) persistent behaviour which is offensive, intimidating, abusive, malicious or insulting;

(b) persistent unjustified criticism;

(c) punishment imposed without justification;

(d) changes in the duties or responsibilities of B to B's detriment without reasonable justification.

(3) Bullying does not include reasonable action taken by an employer relating to the management and direction of the employee or the employee's employment."

"**Bullying of employees.**

6.(1) An employer (A) must not, in relation to employment by A, subject an employee (B) to bullying.

(2) The circumstances in which A is to be treated as having subjected B to bullying under subsection (1) include those where—

(a) a third party bullies B in the course of B's employment; and

(b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.

(3) Subsection (2) does not apply unless A knows that B has been bullied in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.

(4) A third party is a person other than—

(a) A; or

(b) an employee of A's.

(5) An employer will not be in contravention of subsection (1) in relation to a complaint of bullying where he can show—

(a) that at the time of the act or acts complained of—

(i) he had in force a Bullying at Work Policy in accordance with the Schedule; and

(ii) he has taken all reasonable steps to implement and enforce the Bullying at Work Policy; and

(b) as soon as reasonably practicable, he takes all steps as are reasonably necessary to remedy any loss, damage or other detriment suffered by the complainant as a result of the act or acts of which he complains."

51 The Schedule specifies requirements which must be satisfied if the Bullying at Work Policy is to be compliant with s.6 of the Act. It must be distributed to all employees; give examples of bullying; provide a procedure for raising complaints with a specific person identified as the designated person to whom complaints should be made; include a statement of the disciplinary procedure to be employed against "employees who infringe the policy"; make arrangements to train all those with managerial authority in the policy; monitor it annually; and consult with trades unions, safety representatives and other stakeholders on the operation, implementation and any revision of the policy.

52 Section 9(2) of the Act which deals with compensation states:

"(2) When determining the amount of an award of compensation for injury to feelings under subsection (1)(b) the Tribunal shall take into account the seriousness, frequency and persistence of the employer's breach."

53 I make a number of preliminary observations about the nature of this legislation.

54 (1) The Act is about bullying. We were referred to numerous definitions of that term, and Mr. Cruz helpfully drew our attention to authorities in other jurisdictions such as Australia and the USA, where the concept has been employed. It is not necessary to analyse these in any detail. It is clear from these definitions that bullying is typically understood to involve persistent or repeated behaviour which seeks to harm or intimidate persons perceived to be vulnerable. There is often an abusive relationship where one party deliberately takes advantage of a weakness in the other party. The weakness will sometimes be the victim's inferior position in the hierarchy. The harm may be physical or emotional.

(2) The meaning of bullying in the statute depends upon a proper understanding of the inter-relationship of s.4(1) and s.4(2). This is far from clear, as the discussion below demonstrates, but it lies at the heart of the issue in this case: did the incident in question amount to bullying as defined? Section 4(3) excludes from the definition certain reasonable managerial acts of the employer directed to the employee; this hardly assists in an understanding of the section since it is inconceivable that this could amount to bullying on any sensible meaning of that term.

(3) Section 4(1) shows that the conduct in question must cause alarm, distress, humiliation or intimidation. These indicate strong feelings. In *Majrowski* v. *Guy's & St. Thomas's NHS Trust* (5), where the court had to

consider the very closely related concept of harassment, Lord Nicholls observed that when courts are considering whether the quality of conduct truly deserves the epithet "harassment" ([2006] 3 W.L.R. 125, at para. 30): "courts will have in mind that irritation, annoyances, even a measure of upset, arise at all times in everybody's day-to-day dealings with other people." In my judgment a similar approach should be adopted when determining whether the nature and degree of any adverse effect on the victim to alleged bullying is sufficiently grave to merit the description alarm, distress, humiliation or intimidation.

(4) The duty not to bully is imposed on the employer; there is no statutory obligation on the employee not to bully a fellow employee. This does not mean that bullying by an employee is without consequences, however. First, some forms of bullying may involve other torts, such as assault, for which the employee could be liable. Second, an employee risks being disciplined for acts of bullying and serious offences could lead to dismissal.

(5) Section 6(2)–6(4) identifies liability for "deemed" bullying, *i.e.* a situation where, although the bullying has in fact been by a third party other than the employer or an employee, the employer "is to be treated as having subjected" the victim to bullying. The liability arises because the employer has failed to take reasonably practical steps to prevent it. But the employer must be aware that at least two acts of bullying by third parties against the particular victim have occurred in the past. Surprisingly perhaps, there is no similar express provision deeming liability of the employer for acts of his employees. Whether any such liability can be implied is an important issue arising in this appeal.

(6) Section 6(5) should be read together with s.6(1). The latter makes it unlawful for the employer to subject an employee to bullying. In practice, the acts attributed to the employer are taken by a wide range of persons who are authorized to act for or on the employer's behalf. However, save where statute has provided to the contrary, it is not appropriate to treat the act of each employee as being attributed to the employer.

(7) Section 6(5) creates a defence for an employer who would otherwise be liable under s.6(1). The employer will escape liability where the conditions of both subsections (5)(a) and (b) are satisfied. In essence, these provisions require that the employer should have a bullying policy in place and should have taken all reasonable steps to implement and enforce it; and that the employer has sought as soon as is reasonably practical to remedy the adverse consequences of the bullying conduct. Presumably this means once he is satisfied that the alleged bullying has in fact occurred; it cannot mean once the complaint is made when no investigation into its veracity has been carried out. It was accepted by the GHA that it could not seek to rely on this defence in this case.

Was the incident an act of bullying?

55 The tribunal held that the conduct in question amounted to a single act of bullying; it was "one continuing incident spanning a few minutes in time."

56 A central issue before the tribunal was whether this single incident of bullying behaviour could amount to bullying within the meaning of the Act. The argument addressed to the tribunal, as it was to Yeats, J. and before us, was that conduct of this nature had to be persistent before it could be held to amount to bullying. The tribunal did not accept that submission. It held that s.4(2)(c) and (d) provided examples of bullying arising out of a single incident, and drew the inference from these examples that Parliament intended that if an incident was sufficiently serious, it could amount to bullying within the meaning of the section (set out at 2021 Gib LR 148, para. 56):

> "The seriousness of the conduct, taking into account the context in which it has occurred, and the nature of the parties involved, and the act perpetrated, is what differentiates and justifies that one act be considered to be an act of bullying."

The tribunal held that the conduct of Dr. Cassaglia was serious and amounted to bullying.

57 The passage cited in the last paragraph suggests that the test for seriousness is objective. However, elsewhere in the judgment it is said that the employer's conduct should be "assessed subjectively." I am not entirely sure what was intended by such a description, but I think the subjective assessment was intending to focus on the effect on the alleged victim rather than the nature and seriousness of the conduct itself. As I read the decision, the tribunal was not saying that any conduct which subjectively causes genuine distress or alarm is enough to ground liability; there must be conduct capable of being characterized as bullying in its own right. That analysis is supported by the way the tribunal dealt with the claim by Mrs. Smith. The tribunal accepted that she felt distressed by the conduct of Dr. Cassaglia but nevertheless held that the incident in question was not sufficiently serious to justify being treated as an act of bullying as such. Conduct of this nature would need to be persistent to bring it within the scope of s.4(2)(a) so as to amount to statutory bullying. The action directed against her could therefore contribute to and be part of bullying conduct, but it did not itself, taken in isolation, constitute such conduct.

58 Yeats, J. did not agree that a single incident of this nature could amount to bullying as defined, even if it was serious. He accepted that individual incidents could in principle amount to bullying, and cited s.4(2)(c) and (d) as examples of this, but they could not do so if the conduct concerned fell within the scope of s.4(2)(a) or (b). Here the alleged act of

bullying fell within the scope of s.4(2)(a) and accordingly it could only constitute bullying if it was in the context of persistent conduct. The judge observed (*ibid.*, at para. 72) that:

> "it would make no sense for Parliament to specify that *persistent* offensive or intimidating behaviour amounted to bullying if their intention was that a single act of offensive or intimidating behaviour also amounted to bullying. All that Parliament needed to do was omit the word 'persistent.' I agree with Mr. Licudi that the insertion of the word cannot have been accidental." [Emphasis in original.]

59 The judge also held that a purely subjective analysis of the effect of the alleged bullying on the individual affected could not be appropriate (*ibid.*, at para. 82):

> "Applying a subjective element on its own to s.4(1) cannot have been what Parliament intended. If all that was required was a subjective test as to whether an employee felt alarmed *etc.*, then that could give rise to absurd results in the case of an overly sensitive employee who genuinely, but unreasonably, felt any one of the sentiments set out in s.4(1)."

60 The judge concluded that for liability to be established under s.4(1), the potential effect of the conduct had to be assessed both objectively and subjectively (*ibid.*, at para. 84):

> "Is the conduct complained of behaviour which, objectively, could cause alarm, distress, humiliation or intimidation? If the answer is yes, then a subjective test needs to be applied to whether it had the purpose or effect of causing those sentiments. When looking at purpose you look at what the perpetrator intended. When looking at effect, you look at what the victim felt. Only one of either purpose or effect is required to satisfy s.4(1) although of course both will be present in many cases."

61 The judge concluded that it would have been open to the tribunal on the facts to find that the action of Dr. Cassaglia was objectively capable of giving rise to alarm, distress, humiliation or intimidation, and the tribunal found that it did in fact do so. Accordingly, had a single incident been capable of amounting to bullying, the tribunal's conclusion would have been sustainable. (I observe that if the resolution of this case had depended on this finding, the question would arise whether it was open to the judge to determine it in that way. It would arguably be a matter which should have been remitted to the tribunal to determine, as the body legally charged with deciding questions of fact, unless Yeats, J. was satisfied that the only proper conclusion open to the tribunal was that the incident was, objectively viewed, capable of giving rise to alarm or distress. In view of

my conclusions in relation to this appeal, however, nothing turns on this point.)

Submissions on the single incident point

62 The arguments advanced before us essentially replicate those made below. As Yeats, J. said, the question in issue is essentially the relationship between s.4(1) and (2).

63 Mr. Clayton, for the appellant, submits that s.4(1) lays down the relevant definition of bullying and its language is clear: the only issue is whether conduct in question has the purpose or effect of causing B, the alleged victim, to be alarmed, distressed, humiliated or intimidated. When looking at effect, that is an entirely subjective matter and depends solely on the genuineness of B's reaction. The tribunal was wrong to say that a single incident could only constitute bullying if it was sufficiently serious (although in fact this was serious conduct, as the tribunal found). If single incidents of misconduct had to be serious to come within the scope of the section, Parliament would have said so in terms.

64 Nor is s.4(1) in any way modified or restricted by s.4(2). This simply clarifies the definition by making it plain that certain actions will fall within the scope of s.4(1). *Bennion on Statutory Interpretation*, 8th ed., at 18.3 (2020) states that an inclusive definition enlarges or clarifies ambiguity about the meaning of the defined term; it is not legitimate to use it to restrict its scope. Further, neither an inclusive or exclusive definition should be taken to change the meaning of the primary definition itself. There is no basis from the language to exclude a single incident, whether serious or otherwise, from constituting an act of bullying, and indeed s.4(2)(c) and (d) provide clear examples of individual acts.

65 I briefly mention at this point a submission trailed by Mr. Clayton in his oral argument. He sought to advance a case that this was not a single incident but, properly analysed, should be seen as a sequence of acts amounting to "persistent conduct." I categorically reject this argument. It was not raised as a ground of cross-appeal by Mr. Stagnetto before Yeats, J., nor was it raised in the grounds of appeal before us. In any event, it seeks to challenge a clear finding of fact by the tribunal which was plainly open to it. Indeed, I think that any other finding on this particular point would have been perverse. The appeal has properly been argued at all stages on the basis that this was a single incident.

66 Mr. Cruz adopts a diametrically opposite position to the appellant. He submits that in the context of this legislation, s.4(2) is intended to be an exhaustive definition of conduct which can fall within the scope of s.4(1). If the conduct in question does not fall within s.4(2) it cannot constitute bullying within the meaning of the Act. He recognizes that it is highly unusual for a clause ostensibly intending to clarify what might be included

within a definition should be read as exhausting its scope, but if it is clear from the language of the statute, objectively construed in context, that this is the intention of the legislator, the courts must give effect to it. There are precedents where this has occurred: *e.g. Dilworth* v. *Stamps Commr.* (1).

67 Mr. Cruz relies upon four matters in particular to support this conclusion. First, the natural and widely understood meaning of "bullying" envisages that it involves repetitive conduct. Second, the use of the word "conduct" in s.4(1)(a) rather than the term "act" also suggests a mode or pattern of behaviour rather than a single incident. Third, s.4(2)(a) and (b) are wholly consistent with that approach. Although s.4(2)(c) and (d) might appear to contradict this thesis, in reality they do not do so since although each envisages a single act—the imposition of a penalty or a change in terms and conditions of employment respectively—each of which will have continuing effects which are in substance repetitive. Fourth, in an earlier draft of the section published with a Command Paper issued by the Government, s.4(2) referred to conduct "including but not limited to any of the following," and then set out the particular examples. Mr. Cruz submits that the omission of these words in the final draft is very telling and shows that the section was intended to be exhaustive and limited to the particular examples.

68 Mr. Licudi, Q.C. adopted the midway position which found favour with Yeats, J. He accepted that in principle single incidents are capable of constituting conduct falling within the scope of s.4(1), even if only rarely. However, he submitted that it is impossible to say that s.4(2) has no effect on the scope of s.4(1). When s.4(2)(a) and (b) provide that certain conduct must be persistent to amount to bullying, Parliament must be intending to exclude as examples of bullying any conduct of that nature which is not persistent. As the judge explained, Parliament would simply have omitted any reference to the relevant conduct having to be persistent if a single incident would suffice; and if the single incident were enough, persistent conduct of the same nature would plainly be caught also.

69 I do not think that the literal approach advanced by Mr. Clayton can possibly be right, for two related reasons: first, it catches conduct which no-one would conceivably say amounted to bullying as that term is commonly understood; and second, it could be taken to make the touchstone of bullying the simple question whether the victim genuinely feels alarmed, distressed, humiliated or intimidated.

70 The purpose of the legislation is to provide a remedy for bullying, not for any conduct or action which in fact genuinely causes alarm, distress, humiliation or intimidation. If one ignores the nature and character of the cause of such alarm *etc.*, it fails to give effect to the Act's objective since a person may genuinely be alarmed or distressed (although probably not so readily humiliated or intimidated) by conduct far removed from bullying

and possibly even entirely innocent. Take this case; Mr. Cassaglia may have been genuinely distressed by the refusal of the staff member to pass on information until relevant approval had been given, yet it would be absurd to characterize the action of the staff member in withholding the information as bullying. A worker may genuinely cause distress to a colleague by talking about death, for example, without appreciating that the colleague in question has recently suffered bereavement. Mr. Cruz gave other examples; a worker may be distressed if coffee is accidentally spilt over his or her new clothes, or if the worker is involved in an accidental collision with a colleague. In none of these cases is there an intention to alarm or distress, and the conduct giving rise to the distress is far removed from anything which could remotely be characterized as bullying. In my view it is inconceivable that the Parliament could have intended that the concept of bullying should be drawn in such a wide and arbitrary way, wholly unrelated to any common understanding of that term, and indeed catching wholly innocent conduct.

71 Moreover, if Mr. Clayton is right and the only question determining liability is how the alleged victim subjectively reacts to the conduct in question, this would mean that liability is determined by the particular sensitivity of that person. I entirely agree with the observations of Yeats, J. to the effect that it would be absurd to adopt a subjective view such that liability could arise by the abnormal response of an over-sensitive employee. The conduct in question must be such that, objectively viewed, it is capable of causing alarm or distress, or feelings of humiliation or intimidation.

72 Moreover, if a purely subjective reaction to the act or conduct in question were sufficient to establish liability, no other question would be material to determining liability. There would be no need objectively to consider the nature of the conduct in question at all (a procedure which the Bullying Code envisages should be carried out when an allegation of bullying is made): the effect could be enough to constitute bullying without consideration of the cause. Neither the tribunal nor Yeats, J. adopted such a literal view of the section, and in my view they were manifestly right to reject it. The objective element is an important safeguard both to prevent someone unjustifiably being characterized in law as a bully and to ensure that compensation is not paid to someone who ought not to receive it.

73 In my judgment, Yeats, J. was clearly right to conclude that if the alleged conduct falls within the scope of s.4(a) or (b), it must be persistent. It simply makes no sense whatsoever for Parliament to have identified in those examples the need for repetitive conduct if single incidents of that nature would suffice. There is no basis for concluding, as the tribunal did, that a distinction can be drawn between serious and less serious conduct. Indeed, no counsel sought to defend that particular feature of the tribunal's analysis.

74 In my view, therefore, it follows that the relevant incident, being a one-off matter, could not amount to bullying as defined. I would uphold the conclusion of Yeats, J. on this point, for the reasons he gave. Moreover, I consider this to be a sensible conclusion. It is a serious matter to characterize someone as a bully and should not be lightly done. Many people in the course of their working lives will lose their temper with a colleague, perhaps in a manner wholly out of character. It is of course important that all employees, and those in a managerial or supervisory position in particular, should seek to control their emotions and respond in a measured way to the behaviour of subordinates, even when that behaviour is challenging. But human nature being as it is, this is not always possible particularly where, as arguably was the case here, there was an element of provocation or perhaps perceived insubordination causing the over-strident response. It would be highly undesirable if every over-reaction in the course of daily work relations could be subject to review by the courts under the auspices of the bullying legislation. It would also unfairly characterize as bullies persons who in my view ought not to be so designated.

75 I would add that it does not in my view follow that two incidents necessarily create the requisite persistent behaviour. Whilst it may be possible to describe two incidents as persistent conduct, particularly if they are closely connected in time, that will not always be the case. Persistent is defined as "continuing to do something over a prolonged period." Two incidents years apart, for example, may very well not give the sense of continuity necessary to amount to persistent treatment. It is ultimately a matter of fact and degree for the relevant court to determine whether the relevant persistence is present.

76 Given that I have upheld the judge's analysis that this particular conduct cannot constitute bullying since it is a single incident, it is not necessary to determine whether Mr. Cruz is right to say that s.4(2) is exhaustive of the matters which may constitute bullying, and that bullying must always involve persistent conduct and can never be established by a single incident. However, I think his submissions raise points of potential importance with respect to what I think is a very puzzling piece of legislation, and I shall make some observations about them.

77 I see some merit in the argument that s.4(2) is intended to be exhaustive, or at least that this may well be how it operates in practice. I do not think that the omission of the words "but not limited to" from the original draft, carries the day for Mr. Cruz. They might indeed have been intended to make the section provide an exhaustive definition, but equally they might have been omitted because it was thought that they were otiose, being already implicit in the word "includes." Nor do I think that other Parliamentary materials relied upon by Mr. Cruz are either appropriate to be considered or helpful in fact.

78 But there are other factors which lend some support to the view that even if not exhaustive, it will be very rare for bullying conduct not to be caught by one or other of the provisions in s.4(2). In this context a striking feature of s.4(1) is that it does not identify the kind of conduct which might amount to bullying at all, yet, for reasons I have given, bullying cannot result from any conduct, of whatever nature, which has the requisite causal effect on the victim. There must be some way of identifying the kind of conduct which can properly be so described. Section 4(2)(a) is the only provision which actually seeks to do this and to identify the characteristics which typically attach to what can properly be described as potentially bullying conduct, treated independently of its effect. The provision refers to "offensive, intimidating, abusive, malicious or insulting" behaviour. In my view this formulation, coupled with the intent or effect to alarm, distress, humiliate or intimidate, captures the essence of bullying conduct. Moreover, s.4(2)(a) is cast in very broad terms and would be capable of catching a wide range of conduct. Indeed, it is difficult to think of examples of bullying which would not fall within its scope. On this analysis, s.4(2)(a) captures the main category of bullying, and requires the behaviour there described to be persistent. Section 4(2)(b)–(d) can then be seen as specific examples of the more serious acts directed at employees.

79 In the case of s.4(2)(c) and (d) it may be that Parliament was intending spelling out special cases where the conduct need not be persistent or repetitive. I agree with the view expressed by Yeats, J. that the conduct referred to in those provisions are themselves single incidents. In my view, and contrary to the submissions of Mr. Cruz, the fact that they have continuing effects does not alter that fact. However, I do not think it follows that these acts necessarily constitute bullying irrespective of the context in which they were carried out. I doubt whether Parliament intended to remove the requirement that these acts must still be capable of being characterized as bullying conduct along the lines indicated in s.4(2)(a). They need to demonstrate at least some of the characteristics of bullying behaviour, and I do not think that it necessarily follows that they will do so. Take the following example: the employer may have punished a worker by the imposition of a penalty after having honestly found him guilty of an offence following a hearing which was not for some reason fairly carried out. The imposition of an unjustified penalty would almost certainly cause distress to the worker affected, and it can readily be seen that, objectively viewed, it is likely to have that effect. It would be difficult to say that this is saved by s.4(3) which excludes reasonable acts of management taken against the employee from the scope of bullying, because holding an unfair hearing is unlikely to be treated as reasonable conduct. At the same time, I find it difficult to say that the defect in the process justifies treating the imposition of the penalty as an act of bullying. There may well be a breach of contract, or the conduct might possibly amount to grounds for claiming constructive dismissal, but it seems to me to be wrong to describe it,

without more, as bullying. Of course it might be such as where the penalty is imposed following earlier hostile acts which can legitimately be characterized as bullying and can therefore be seen as part of a course of conduct. Demotions and other adverse changes in employment terms rarely occur out of the blue; they are usually the culmination of a history of alleged dissatisfaction. I accept that it is ultimately open to Parliament to treat as bullying something which would not generally be so described. However, the implications of being characterized as a bully are serious, and there is no reason to suppose that Parliament intended to extend the concept of bullying so as to catch categories of conduct which, whilst unreasonable or unfair, would not typically be perceived to justify that epithet.

80 Accordingly, the appeal on this central ground fails. In my judgment Yeats, J. came to the correct conclusion that the incident in question did not and could not in law amount to bullying. I would leave open the question whether single incidents other than those described in s.4(2)(c) and (d) could ever constitute bullying, but if they can, it will only be in a very unusual case.

Is the GHA liable for the actions of Dr. Cassaglia?

81 Given my conclusion that there was no bullying in law, this issue does not strictly arise. But again, we were asked to address it because of its potential importance, and I will do so. On the assumption that Dr. Cassaglia's conduct amounted to bullying in law, would the GHA be liable for his actions?

82 An employer can either be vicariously liable for the wrongdoing of his employee, or he can be personally liable for his own wrongdoing. Vicarious liability is a common law concept which has expanded significantly over the years. Mr. Clayton and Mr. Cruz sought to demonstrate liability on that footing. However, in my judgment there can be no doubt that the GHA cannot be vicariously liable for the act of bullying by an employee in the circumstances of this case. This was the conclusion of Yeats, J., and I agree with him. The reason is that vicarious liability is a secondary and not a primary liability; it can arise only when the employee has primary liability for the alleged wrong. Since the employee is not personally liable in law for the act of bullying, the doctrine of vicarious liability does not arise. The point was succinctly put by Lord Nicholls in *Majrowski* v. *Guy's & St. Thomas's NHS Trust* (5) ([2006] 3 W.L.R. 125, at paras. 7 and 9–10):

> "7. Vicarious liability is a common law principle of strict, no-fault liability. Under this principle a blameless employer is liable for a wrong committed by his employee while the latter is about his employer's business. The time-honoured phrase is 'while acting in the course of his employment'. It is thus a form of secondary liability.

> The primary liability is that of the employee who committed the wrong."

Later in para. 10, Lord Nicholls emphasized the point: "A precondition of vicarious liability is that a wrong must be committed by an employee in the course of his employment." Then at para. 15 he specifically rejected an explanation for vicarious liability which claimed that the employer is liable for what the employee had done rather than because the employee had committed a wrong. He treated as "settled law" the principle that the employer was liable for the employee's wrongs—"the employee's wrong is imputed to the employer."

83 In *NHS Manchester* v. *Fecitt* (8), fellow workers had taken hostile action against whistle-blowers. Under the relevant legislation as it stood at that time, the employer was liable for taking detrimental action against whistle-blowers, but there was no liability imposed upon employees who might act in that way. The court held, following *Majrowski*, that the employer could not be vicariously liable for the acts in question. The legislation was thereafter amended so as to make the employer liable in two distinct ways: first, liability was imposed on the fellow worker for such detrimental acts (subject to a limited defence) thereby enabling the doctrine of vicarious liability to be engaged; and second, it was specifically provided that acts of a fellow worker were to be treated as acts of the employer, thereby creating a deemed personal liability: see Employment Rights Act 1996, s.47(1A) and (1B) respectively.

84 The critical feature of this statute is that, as with *Fecitt*, the employee is not made liable for his own act of bullying. Section 6 imposes a liability on the employer for bullying but there is no separate liability, either at common law or under the statute, on the employee who actually commits the act of bullying. Of course, the employee may be liable for an act committed in the course of bullying, such as an assault, and the employer will then be vicariously liable for that act of assault. But that was not the complaint here. The employer cannot be vicariously liable for any act of bullying itself, even though that act satisfies the statutory definition. Consequently, any liability of the employer has to be personal liability.

85 Mr. Clayton asserts that it would materially narrow the protection intended for bullied employees if an employer was only personally liable for his own wrongdoing. It could not be what Parliament intended. If the employer is not vicariously liable for the acts of his employees, then he must be personally liable for their acts of bullying.

86 Statute can, and sometimes does, specifically impose a personal liability on the employer for the acts of its employees by deeming or treating the acts of the employee as the act of the employer. It is important not to confuse this deemed personal liability with vicarious liability, however, and indeed there is often a defence for the former which is

unavailable for the latter. As I have said, the "deeming" principle was in part how the UK Parliament sought to remedy the lacuna in the law highlighted in the *Fecitt* case (8) . The same approach has been adopted in Gibraltar legislation. The Equal Opportunities Act 2006 prohibits discrimination and victimization with respect to a wide variety of grounds. Section 47(1) provides in terms that:

> "47.(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."

87 Section 47(2) imposes a similar responsibility on the employer for the acts of his agents. Section 47(3) provides a defence where the employer proves that he has taken "such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment, acts of that description."

88 There is no similar express provision in the Bullying at Work Act so if the acts of employees are to be attributed to the employer, this principle will have to be implied. In my view that is a difficult argument where the precedent for attributing liability for employees is available in the Equal Opportunities Act and yet Parliament has not chosen to adopt it. Moreover, I do not accept, as Mr. Clayton contends, that the Bullying Act would be rendered virtually useless without making the employer liable in that way. It is now well established that the employer, if a corporate body, can in an appropriate case be liable in law for conduct of any employee whose acts or state of mind can properly be attributed to the employer: see the decision of the Privy Council in *Meridian Global Funds Mgmt. Asia Ltd.* v. *Securities Commn.* (6). There was virtually no discussion in argument about how that principle would play out in this context, no doubt because the focus was on vicarious liability where the question of attribution does not arise. But I would have thought that the application of *Meridian* principles would in many circumstances at least mean that any supervisor bullying a subordinate would be treated as the act of the employer who had, by appointing him to a disciplinary role, conferred the authority to discipline upon him. So, for example, any act which falls within the scope of s.4(2)(c) and (d)—unjustified punishment or unjustified changes in terms and conditions—would inevitably be seen as acts of the employer; and I do not see why conduct falling within s.4(2)(a) and (b) could not similarly be attributed to the employer, at least in many situations, where it was carried out by management at any level.

89 However, although there are powerful arguments against implying a statutory personal liability for the acts of all employees whether or not their actions would be attributed to the employer on established *Meridian* principles, I am unwilling to reach a concluded view on this issue. We

heard virtually no argument on the question and there may be factors pointing in favour of such an implication. I note, for example, that s.6(2) provides that the circumstances when the employer will be treated as having subjected his employee to bullying *include* actions by third parties. This seems to presuppose that the Act envisages other circumstances when such "deeming" occurs, and they would naturally be where the act is committed by an employee.

90 Yeats, J. found that an employer might be personally liable for the bullying acts of his employees on a basis which neither relies upon attribution along *Meridian* principles nor upon a general principle of implied attribution. The employer would not, however, be liable for the first incident of bullying, even if this were otherwise actionable. The judge explained the rationale as follows (2021 Gib LR 148, at paras. 95–96):

> "95 In my judgment, there has to be a consideration of whether the behaviour or incident can be attributable to the employer for it to fall within s.6(1). The fact that an employer has to *subject* an employee to bullying under s.6(1) for it to be liable ties in with the examples contained in s.4(2). In examples (c) and (d) of s.4(2) it is the employer himself who is doing the acts. In examples (a) and (b), there is a requirement for persistence. As Mr. Licudi said, if there is more than one incident of abusive behaviour or unjustified criticism then it is likely that something has gone wrong with the policies that an employer has in place. In those circumstances, he has ted his employee to bullying through the actions of the offending employee.
>
> 96 Notwithstanding the fact that at the material time Dr. Cassaglia was the most senior person within the GHA, the claim against the GHA was brought on the basis that Dr. Cassaglia was an employee and not on the basis that he personified the employer. The behaviour found by the Chairman was a one-off isolated incident which could not have been foreseen by the GHA. The GHA cannot be said to have subjected Mr. was not therefore in breach of s.6 of the Act. The second ground of appeal is also made out."

91 I have difficulty in accepting that liability for bullying could arise in this way. Even assuming that an employer ought to have known of the fellow employee's bullying conduct from an earlier occasion—an assumption which will in my view often be unrealistic, particularly as victims are notoriously reluctant to complain—and should have taken action to prevent repetition, I do not see how his failure to do so can amount to an act of bullying in its own right. Nor in my view can the negligent employer, as a result of his negligence in failing properly to enforce a bullying policy, be said to be participating in the bullying with the primary wrongdoer. The bullied employee may in these circumstances have a remedy against the employer for breach of contract or negligently failing

to protect his or her health, but I do not see how these facts would properly justify the imposition of liability for bullying itself.

92 On the facts of this case it may well be that the application of *Meridian* principles would have made the GHA personally liable for the acts of its Medical Director. On that basis, if the single incident could constitute an act of bullying, compensation would have been payable. However, as Yeats, J. said, the case was never in fact argued on that basis. Liability was said to attach to the employer simply on the basis that he was liable for the act of his employees, either vicariously or personally, irrespective of their function or status. For reasons I have given, in my view vicarious liability is not applicable as a basis of liability and there is no express attribution creating personal liability. Whether there is a principle of implied attribution will, for reasons I have given, have to be argued on another occasion. It would not, in any event, alter the outcome of this appeal.

93 It will be obvious from this judgment that I have not found this Act easy to interpret or apply. There is a lack of clarity about fundamental questions such as precisely what amounts to unlawful bullying, and when the employer will be personally liable for the acts of bullying by his employees. Parliament might think it appropriate to amend the legislation to clarify these difficult and important issues.

Conclusion

94 For the reasons I have given, which for the most part do no more than reflect the reasoning of Yeats, J. in his very impressive judgment below, I would dismiss this appeal.

95 **DAVIS, J.A.:** I agree.

96 **KAY, P.:** I also agree.

Appeal dismissed.
